

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Re: Appeal to the Board of Patent Appeals and Interferences

Appellants	Przepasniak et al.	)	Examiner:	Chapman, Ginger T.
)		
Serial Number:	10/732,827	)	Group Art Unit:	3761
)		
Filed:	December 10, 2003	)	Customer Number:	22827
)		
Confirmation No.:	6772	)	Deposit Account:	04-1403
)		
Title:	"Interlabial Absorbent Article with Improved Flushability Characteristics"	)	Attorney Docket No.:	KCX-660 (19116)
)		

1. ☐ **NOTICE OF APPEAL:** Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals from the decision dated _____ of the Examiner twice/finally rejecting claims _____.
2. ☒ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy).
3. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).
4. ☐ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).
5. ☐ "Small entity" verified statement filed: [] herewith [] previously.

6. **FEE CALCULATION:**

	Fees
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PETITION is hereby made to extend the original due date of October 29, 2008, hereby made for an extension to cover the date this response is filed for which the requisite fee is enclosed (1 month \$130; 2 months \$490; 3 months \$1,110; 4 months \$1,730, 5 months \$2,350

\$ 0.00

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Less any previous fee paid for prior Notice of Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ 0.00

Less any previous fee paid for submitting Brief on prior Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - \$ 0.00

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TOTAL FEE ENCLOSED: \$ 540.00

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- ☐ Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

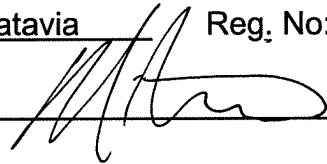
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DORITY & MANNING ATTORNEYS AT LAW, P.A.

ADDRESS:

Post Office Box 1449
Greenville, SC 29602 USA
Customer ID No.: 22827
Telephone: (864) 271-1592
Facsimile: (864) 233-7342

By: Neil M. Batavia Reg. No: 54,599


Signature: 

Date: October 29, 2008

I hereby certify that this correspondence and all attachments and any fee(s) are being electronically transmitted via the internet to the U.S. Patent and Trademark Office using the Electronic Patent Filing System on October 29, 2008.

Denise R. Ginn

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(Signature of person transmitting documents)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF APPEALS AND INTERFERENCES**

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BRIEF ON APPEAL

Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellants submit the following brief on appeal in accordance with 37 C.F.R. §
41.37:

1. REAL PARTY IN INTEREST

The real party in interest in this matter is the assignee of record, Kimberly-Clark
Worldwide, Inc.

2. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellants or the
Appellants' legal representative which will directly affect or be directly affected by or
have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS

Currently, claims 1-16 remain pending in the present application, including independent claims 1, 12 and 14. Claims 4 and 7 were previously withdrawn. Claims 1-3, 5-6 and 8-16 stand rejected in the Final Office Action dated April 29, 2008, including independent claims 1, 12 and 14. All of the claims are attached hereto in the Claims Appendix.

The rejection of claims 1-3, 5-6 and 8-16 is hereby appealed.

4. STATUS OF AMENDMENTS

To the Appellants' knowledge, all amendments have been entered into the record.

5. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 1 is generally directed to an interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer. The article includes a generally liquid permeable, non-apertured cover sheet comprising a first material. See, e.g., pg. 3, lines 31-32; pg. 15, lines 25-30; FIGS. 1-3. The article also includes a generally liquid impermeable back sheet comprising a second material, the second material different from the first material, and an absorbent material disposed between the cover sheet and the back sheet. See, e.g., pg. 3, line 32 – pg. 4, line 1; pg. 17, lines 7-33. The back sheet has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of the cover sheet. See, e.g., pg. 4, lines 1-2. The cover sheet and the back sheet have a contact angle mismatch of less than about 25%. See, e.g., pg. 4, lines 2-3. The article, upon being flushed, has an initial

neutral buoyancy and subsequently sinks within about 7 days from being flushed. See, e.g., pg. 7, lines 2-7.

Independent claim 12 is generally directed to an interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer. The article includes a generally liquid permeable, non-apertured cover sheet comprising a first material having a water vapor transmission rate of at least about 30,000 g/m²-24 hrs. See, e.g., pg. 3, lines 31-32; pg. 4, lines 4-5; pg. 12, lines 12-13; pg. 15, lines 25-30; FIGS. 1-3. The article also includes a generally liquid impermeable back sheet comprising a second material having a water vapor transmission rate of at least about 10,000 g/m²-24 hrs, the second material different from the first material. See, e.g., pg. 3, line 32 – pg. 4, line 10; pg. 17, lines 7-33. An absorbent material is disposed between the cover sheet and the back sheet and has a density greater than 1.0 g/cc. See, e.g., pg. 4, lines 16-18. The back sheet has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of the cover sheet. See, e.g., pg. 4, lines 1-2. The article, upon being flushed, has an initial neutral buoyancy and subsequently sinks within about 7 days from being flushed. See, e.g., pg. 7, lines 2-7.

Independent claim 14 is generally directed to an interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer. The article includes a generally liquid permeable, non-apertured cover sheet comprising a first material. See, e.g., pg. 3, lines 31-32; pg. 15, lines 25-30; FIGS. 1-3. The article also includes a generally liquid impermeable back sheet comprising a second material, the second material different from the first material. See, e.g., pg. 3, line 32 – pg. 4, line 1; pg. 17, lines 7-33. An absorbent material is disposed between the cover sheet and the

back sheet and has a density greater than 1.0 g/cc. See, e.g., pg. 4, lines 16-18. The back sheet has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of the cover sheet. See, e.g., pg. 4, lines 1-2.

6. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

In the Final Office Action, claims 1-3, 5-6, and 8-16 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,514,602 to Zhao et al., in view of U.S. Patent No. 6,663,611 to Blaney et al., in view of U.S. Patent No. 6,232,521 to Bewick-Sonntag et al., and further in view U.S. Patent No. 5,613,964 to Grenier.

7. ARGUMENT

Appellants respectfully submit that the presently pending claims are patentable over the cited references.

- I. **Independent claims 1, 12, and 14 patentably define over U.S. Patent No. 6,514,602 to Zhao et al., either alone, or in any proper combination with U.S. Patent No. 6,663,611 to Blaney et al., U.S. Patent No. 6,232,521 to Bewick-Sonntag et al., and/or U.S. Patent No. 5,613,964 to Grenier.**

Independent claims 1, 12, and 14 are generally directed to interlabial absorbent articles configured for disposition within the vestibule of a female wearer. The absorbent articles described therein include a generally liquid permeable cover sheet, a generally liquid impermeable back sheet, and an absorbent material disposed therebetween. All of the claims require the back sheet to have a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the cover sheet.

As correctly noted in the Final Office Action, Zhao et al. fails to disclose a back sheet having a water vapor transmission rate that is at least about 20% of the water

vapor transmission rate of the cover sheet. Page 3, Final Office Action. Blaney et al. was cited to remedy this deficiency. It was stated that Blaney et al. “teaches the ability of cover sheets and outer sheets to have different relative levels of breathability for wearer comfort, i.e. different vapor transmission rates, thus disclosing a desire for such.” Page 4, Final Office Action. The Final Office Action further stated that Blaney et al. describes an absorbent article having an outer cover 16 (so-called cover sheet) that has a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the back sheet (described as inner laminate 50 in the portion of Blaney et al. cited in the Final Office Action). However, it is respectfully submitted that Zhao et al., either alone or in any proper combination with Blaney et al., Bewick-Sonntag et al., and/or Grenier, fail to teach or suggest the limitations of independent claims 1, 12, and 14.

A. The combination of Zhao et al. with Blaney et al. fails to teach or suggest a back sheet having a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of a cover sheet, as required by all of the pending claims.

As described above, the Final Office Action acknowledges that Zhao et al. fails to disclose a back sheet having a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the cover sheet but Blaney et al. was cited to remedy this deficiency. Page 3, Final Office Action. The Final Office Action asserts that Blaney et al. describes an absorbent article having an outer cover 16 (so-called cover sheet) that has a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the back sheet (described as inner laminate 50 in the portion of Blaney et al. cited in the Final Office Action). Page 4, Final Office Action. It was stated that “[i]n view of the teachings of Blaney, it would have been obvious...to form

the back and cover sheets having the claimed ratio of WVTR since on of ordinary skill in the art would only have to reverse the configuration taught by Blaney to obtain the claimed limitation." Id.

However, the inner laminate 50 (so-called back sheet) of Blaney et al. is positioned *between* the liquid impermeable outer cover 16 and absorbent layer 17. Therefore, such a configuration fails to render obvious the presently pending claims.

The presently pending claims require, in part, a generally liquid permeable cover sheet, a generally liquid impermeable back sheet, and an absorbent material *disposed between the cover sheet and the back sheet* with the back sheet having a water vapor transmission rate that is at least about 20% of the water vapor transmission rate of the cover sheet. Blaney et al. describes a liquid permeable top layer 21 and a liquid impermeable outer cover 16 which sandwich the absorbent core 17 that is positioned therebetween. However, Blaney et al. does not describe the breathability of the liquid permeable top layer 21. In this regard, FIG. 2 of Blaney et al. is instructive.

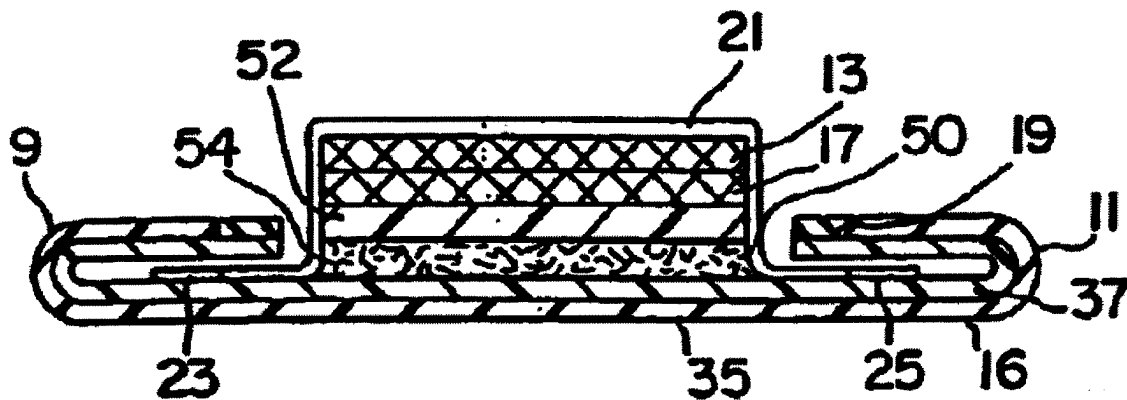


FIG. 2

As can be seen above, the inner laminate 50 (so-called back sheet in the Final Office Action) is positioned between the outer cover 16 and the absorbent layer 17. Col. 8, lines 2-4. While the Final Office Action cites Blaney et al. as describing a cover sheet having a water vapor transmission rate that is at least 20% of a water vapor transmission rate of a back sheet, in actuality Blaney et al. indicates that the outer cover 16 is at least 20% more breathable than inner laminate 50. As described above, the presently pending claims require a back sheet that has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of a cover sheet, with the absorbent material disposed *between the liquid impermeable back sheet and liquid permeable cover sheet*. Blaney et al. provides no description regarding the water vapor transmission rate of outer cover 16 when compared to liquid permeable top layer 21, which together sandwich absorbent core 17. The remaining cited references of Sonntag et al., and Grenier fail to remedy this deficiency. As such, it is respectfully submitted that the presently pending claims patentably define over the cited references.

In response, the Final Office Action asserts that “Blaney teaches the principle of choosing a WVTR between the back sheet and the cover sheet, therefore it would have been obvious...to select materials having different WVTR ratios for the intended purposes since it has been held that mere reversal of the essential working parts of a device involves only routine skill in the art.” Pages 9-10, Final Office Action. However, as discussed above, the inner laminate 50 is by no means synonymous with liquid permeable top cover 21 so more than a mere reversal of parts would be required to arrive at the presently pending claims. If the Final Office Action is implying that liquid permeable top cover 21 could be substituted with inner laminate 50, such a substitution

would completely frustrate the operation of Blaney et al. In this regard, the top cover 21 of Blaney et al. is liquid permeable while the film component 52 of inner laminate 50 is designed to act as a *liquid barrier*. Thus, the Final Office Action's picking and choosing of an arrangement to support an obviousness rejection is not only improper but it would frustrate the operation of the article of Blaney et al.

Plainly, the Examiner's only incentive or motivation for so modifying Zhao et al. using the teachings of Blaney et al. in the manner suggested in the Final Office Action results from using Appellant's disclosure as a blueprint to reconstruct the claimed invention out of isolated teachings in the prior art, which is improper under 35 U.S.C. § 103. The U.S. Supreme Court recently reaffirmed that "[a] factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of argument reliant upon ex post reasoning." KSR Int'l Co. v. Teleflex Inc., 127 S. Ct. 1727, 82 USPQ2d at 1397. Here, Zhao et al., when combined with Blaney et al., simply does not teach or suggest all of the limitations of the presently pending claims. As Bewick-Sonntag et al. and Grenier to not remedy the deficiencies of Zhao et al. and Blaney et al., it is respectfully submitted that the presently pending claims patentably define over the cited references.

B. The combination of Zhao et al. with Bewick-Sonntag et al. fails to teach or suggest a cover sheet and back sheet having a contact angle mismatch of less than about 25%, as required by independent claim 1.

Similarly, the Office Action acknowledges that Zhao et al. does not describe a cover sheet and back sheet having a contact angle mismatch of less than about 25%, as required by the presently pending claims. Page 4, Final Office Action. Nonetheless, it was stated that "it would have been obvious...to form the cover and back sheets of

Zhao having the claimed contact angle mismatch as taught by Bewick-Sonntag.” Pages 4-5, Final Office Action.

However, Bewick-Sonntag et al. plainly states that the wearer facing surface has a fluid contact angle greater than the fluid contact angle of the garment facing surface or vice versa. Col. 6, line 61 – Col. 7, line 5. In this regard, it is stated that *increased* contact angle gradients are useful in preventing fluid transport. Col. 7, lines 22-27. By contrast, the presently pending claims require a contact angle mismatch between the cover sheet and back sheet of *less than about 25%*. Not only is Bewick-Sonntag et al. absent of any discussion regarding such a limitation, but the description suggests that Bewick-Sonntag et al. actually teaches away from such a feature. It is improper to combine references where the references teach away from their combination. In re Grasselli, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). As such, it is respectfully submitted that the independent claim 1 patentably defines over the cited references.

C. Zhao et al., either alone or in any proper combination, fails to teach or suggest the limitations of dependent claims 2-3, 5- 6, 8-11, 13, and 15-16.

The Final Office Action also rejected certain dependent claims in the present application (claims 2-3, 5- 6, 8-11, 13, and 15-16) under 35 USC § 103(a) as being unpatentable over Zhao et al. in view of the previously discussed references.

These claims depend either directly or indirectly from independent claims 1, 12, and 14 and recite the present invention in varying scope. Appellants have herein discussed Zhao et al. and other references in relation to claims 1, 12, and 14. The dependent claims 2-3, 5- 6, 8-11, 13, and 15-16 are similarly distinguishable not only because of the patentability of independent claims 1, 12, and 14 but also because of the

combination of the subject matter of each of the dependent claims with their independent claim which makes each claim further distinguishable, and which is not taught or suggested by Zhao et al. in any proper combination.

For example, dependent claims 2 and 4-6 (as well as independent claim 12 and dependent claim 13 which depends therefrom) require the cover sheet to have a water vapor transmission rate of at least about 30,000 g/m²-24 hrs or greater and the back sheet to have a water vapor transmission rate of at least about 10,000 g/m²-24 hrs. The Final Office Action acknowledges that “Zhao does not explicitly disclose ratios of WVT rates” for cover sheets and Zhao “teaches backsheets having a moisture vapor transmission rates (MVTR) of at least about 500 g/m²/24 hours to at least about 1000 g/m²-24 hrs. Page 3, Final Office Action. Nonetheless, the Final Office Action argues that the claimed water vapor transmission rate “would be inherent in the material” of Zhao et al.

To establish inherency, the evidence must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill. The mere fact that a certain thing may occur or be present in the reference is not sufficient. In re Robertson, 169 F.3d 743, 745, 49 U.S.P.Q.2d 1949, 1950-51 (Fed. Cir. 1999) (citations omitted); In re Rijckaert, 9 F.3d 1531, 1534, 28 U.S.P.Q.2d 1955, 1957 (Fed. Cir. 1993). Simply stated, inherency may not be established by probabilities or possibilities.

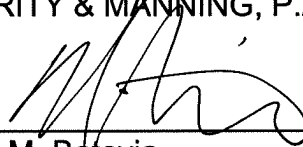
Here, Zhao et al. does not describe any water vapor transmission rates for the cover sheets therein and describes moisture vapor transmission rates that are almost 10 times less than those claimed in the present application. As such, the Final Office

Action has failed to demonstrate that the claimed water vapor transmission rates are necessarily present in Zhao et al.

For the reasons stated above, it is Appellants' position that the Examiner's rejection of claims has been shown to be untenable and should be **reversed** by the Board. Please charge any additional fees required by this Appeal Brief to Deposit Account No. 04-1403.

Respectfully submitted,

DORITY & MANNING, P.A.



Neil M. Batavia
Registration No. 54,599

October 29, 2008
Date

P.O. Box 1449
Greenville, SC 29602
Telephone: (864) 271-1592
Facsimile: (864) 233-7342

9. CLAIMS APPENDIX

1. (Rejected) An interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer, comprising:
 - a generally liquid permeable, non-apertured cover sheet comprising a first material;
 - a generally liquid impermeable back sheet comprising a second material, said second material different from said first material;
 - an absorbent material disposed between said cover sheet and said back sheet;wherein said back sheet has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of said cover sheet;
 - wherein said cover sheet and said back sheet have a contact angle mismatch of less than about 25%; and
 - wherein upon being flushed, said article has an initial neutral buoyancy and subsequently sinks within about 7 days from being flushed.
2. (Rejected) The interlabial absorbent article as in claim 1, wherein said cover sheet has a water vapor transmission rate of at least about 30,000 g/m²-24 hrs.
3. (Rejected) The interlabial absorbent article as in claim 2, wherein said cover sheet comprises a spunlace laminate material of rayon and film.
4. (Withdrawn) The interlabial absorbent article as in claim 2, wherein cover sheet comprises a bonded carded web material having water vapor transmission rate of greater than about 50,000 Mocon value.
5. (Rejected) The interlabial absorbent article as in claim 1, wherein said back sheet comprises a HBSTL material having a water vapor transmission rate of at least about 10,000 g/m²-24 hrs.
6. (Rejected) The interlabial absorbent article as in claim 1, wherein said cover sheet has a water vapor transmission rate of about 40,000 g/m²-24 hrs and said back sheet has a water vapor transmission rate of about 10,000 g/m²-24 hrs.

7. (Withdrawn) The interlabial absorbent article as in claim 1, wherein said cover sheet has a water vapor transmission rate of about 50,000 Mocon value and said back sheet has a water vapor transmission rate of about 10,000 Mocon value.

8. (Rejected) The interlabial absorbent article as in claim 1, wherein said absorbent material has a dry density of at least about 1.0 g/cc.

9. (Rejected) The interlabial absorbent article as in claim 1, wherein said absorbent material has wet density of at least about 1.0 g/cc.

10. (Rejected) The interlabial absorbent material as in claim 1, wherein said cover sheet is adhered to said back sheet with an adhesive around a circumference of said article, and wherein said article does not separate into individual components for at least about 7 days after being flushed.

11. (Rejected) The interlabial absorbent article as in claim 1, wherein said absorbent material comprises a cotton/rayon blend.

12. (Rejected) An interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer, comprising:

a generally liquid permeable, non-apertured cover sheet having a water vapor transmission rate of at least about 30,000 g/m²-24 hrs, said cover sheet comprising a first material;

a generally liquid impermeable back sheet having a water vapor transmission rate of at least about 10,000 g/m²-24 hrs, said back sheet comprising a second material, said second material different from said first material;

an absorbent material disposed between said cover sheet and said back sheet, said absorbent material having a density greater than 1.0 g/cc;

wherein said water vapor transmission rate of said back sheet is at least about 20% of said water vapor transmission rate of said cover sheet; and

wherein upon being flushed, said article has an initial neutral buoyancy and subsequently sinks within about 7 days from being flushed.

13. (Rejected) The interlabial absorbent article as in claim 12, wherein said cover sheet and said back sheet have a contact angle mismatch of less than about 25%.

14. (Rejected) An interlabial absorbent article configured for disposition primarily within the vestibule of a female wearer, comprising:

a generally liquid permeable, non-apertured cover sheet comprising a first material;

a generally liquid impermeable back sheet comprising a second material, said second material different from said first material;

an absorbent material disposed between said cover sheet and said back sheet;

wherein said back sheet has a water vapor transmission rate that is at least about 20% of a water vapor transmission rate of said cover sheet; and

wherein said absorbent material has a dry density of at least about 1.0 g/cc.

15. (Rejected) The interlabial absorbent article as in claim 14, wherein said cover sheet and said back sheet have a contact angle mismatch of less than about 25%.

16. (Rejected) The interlabial absorbent article as in claim 14, wherein said article has an initial neutral buoyancy such that said article sinks within about 7 days from being flushed.

10. EVIDENCE APPENDIX

None

11. RELATED PROCEEDINGS APPENDIX

None